Morgan, Lewis & Bockius LLP
502 Carnegie Center
Princeton, NJ 08540
Tel: 609.919.6600
Fax: 609.919.6701
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW
A Pennsylvania Limited Liability Partnership
RANDALL B. SUNBERG
Partner-in-Charge

August W. Heckman III
Associate
609-919-6696
aheckman@morganlewis.com

October 28, 2013

VIA EMAIL AND ECF

The Honorable Katherine B. Forrest
United States District Judge
United States District Court, District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl St., Courtroom 15A, New York, NY 10007-1312

Re: David Sellers v. Royal Bank of Canada, et al.
Docket No. 12 Civ. 1577 (KBF)

Dear Judge Forrest:

We represent Defendants in the above-referenced matter and write in response to the Court's October 24, 2013 Order, endorsed on Plaintiff's October 21, 2013 letter to the Court.

As a threshold matter, Defendants point out Plaintiff's repeated complaint of a "pattern of evasion" that does not exist. Plaintiff has raised the same complaint with the Court and lost, three times. The only pattern established in this case is Plaintiff's refusal to accept that he has received fulsome and complete discovery. Plaintiff refuses to acknowledge that the "policies" he seeks – whether formal or informal – simply do not exist; to the extent that they do, they were produced. Plaintiff cannot identify a single shred of ***relevant*** evidence Defendants withheld for the simple reason that no such evidence has been withheld and all relevant individuals have been identified. *See, e.g.*, *Collens v. City of New York*, 222 F.R.D. 249, 253 (S.D.N.Y. 2004) ("courts should not grant discovery requests based on pure speculation that amount to nothing more than a 'fishing expedition' into actions . . . not related to the alleged claims or defenses") (citation omitted); *see also In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 69 (2d Cir. 2003) (federal rules afford district courts broad discretion to manage discovery).

Defendants address each of Plaintiff's specific points, in turn, below. Simply put, Defendants have fully complied with the Court's October 15, 2013 Order, including the revisions reflected on the October 24, 2013 Order.

- A list of all of Defendants' employees who were involved in the Plaintiff's termination.

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As a threshold matter, Plaintiff was not "terminated" from employment, as he was never "hired" as an employee. Plaintiff takes issue with this statement, referring to it as a "ploy to object and refuse to respond." It is nothing of the sort. In response to the Court's Order, Defendants identified the decision-maker and the individual who approved the decision with respect to not renewing Plaintiff's independent contractor agreement (*i.e.*, what Plaintiff considers to be his "termination"). Defendants are at a loss to understand what more Plaintiff wants and/or needs. To the extent that Plaintiff wants to challenge the legitimate non-discriminatory basis for Defendants' decision, he has all the information required – and has had it for months.

- Any formal document setting forth Defendants' hiring and firing policies related to independent contractors.

Defendants confirmed that there are no formal documents setting forth Defendants' hiring and firing policies related to independent contractors during the time period Plaintiff performed such services for Defendants. Despite the clarity of this confirmation, Plaintiff now contends that it is "evasive" because he originally requested all "policies, procedures and practices." Even using Plaintiff's jargon, the result is the same – there are no documents setting forth a policy, practice or procedure concerning the hiring and firing (or retention and expiration) of independent contractors during the time period that Plaintiff was engaged as an independent contractor except those reflected in the documents produced in response to Plaintiff's discovery requests – *i.e.*, the 2006 template independent contractor agreement (RBC_014214) and those documents generated during Plaintiff's retention (*e.g.*, hiring), bearing Bates stamp numbers RBC_014197 through RBC_014232.

- Any formal document setting forth Defendants' hiring and firing policies related to employees.

Defendants confirmed that there are no formal documents setting forth Defendants' hiring and firing policies related to employees during the time period Plaintiff performed independent contractor services for Defendants, except for the Employment At Will Policy, which was previously provided to Plaintiff bearing Bates stamp numbers RBC_014311 through RBC_014312. While Plaintiff may not be pleased with the fact that no such policy documents exist, that does not change the fact that the only policy regarding the hiring and firing of employees is the Defendants' Employment At Will Policy. *See*, *e.g.*, *Ub Found. Activities, Inc. v. IT Healthtrack, Inc.*, 2009 U.S. Dist. LEXIS 108109 (W.D.N.Y. Nov. 19, 2009) ("a request for documents does not include the obligation to create information or documents"). Tellingly, Plaintiff has not articulated any basis for a belief that any other responsive and relevant document exists. Further, even is such documents did exist (which they do not) they have no relevance whatsoever to Plaintiff's age discrimination and misclassification claims. Any "hiring and firing policies [practices, informal policies, procedures, etc.] related to employees" were not applied to Plaintiff given his status as an independent contractor (despite the fact that Plaintiff now challenges the legality of that status). *See In re Surety Ass'n*, 388 F.2d at 414 ("[P]arties should not be permitted to roam in the shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.").

- A job description of an exemplar individual (either an employee or independent contractor of Defendants) whose position is or was as similar as possible to Plaintiff.

Plaintiff concedes (surprisingly) that "Defendants provided information that appears to be responsive to the Courts [sic] Order."

For these reasons, Defendants respectfully request that Plaintiff's October 21, 2013 letter request for additional discovery be denied.

Respectfully submitted,

August W. Heckman III

cc: James P. Walsh, Jr., Esq.
David Sellers (via email & U.S. Mail)